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No. 03-6821
CAPITAL CASE

**In the SUPREME COURT of the UNITED STATES**

DAVID LARRY NELSON,
Petitioner,

v.

DONAL CAMPBELL and
GRANTT CULLIVER,
Respondents.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

# SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

I. There is No Split in the Circuits Regarding Whether a Claim Such as Nelson's Can be Brought Under Section 1983. ..... 2

A. There is no split of authority on the issue whether a claim such as Nelson's can be brought under section 1983. ..... 2

B. Because Nelson's complaint challenges procedures which may be necessary to carry out his sentence, his claim is a challenge to the sentence itself. ..... 7

II. Nelson's Decision to File at the Eleventh Hour is not "Properly Attributable" to the Respondents. ..... 12

CONCLUSION ..... 15

CERTIFICATE OF SERVICE ..... 16




## TABLE OF AUTHORITIES

### CASES


*Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998) ..... 3, 5, 6

*FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) ..... 3, 6

*Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932 (11th Cir. 2001) 3, 6

*Heck v. Humphrey*, 512 U.S. 477 (1994) ..... 7

*In re Sapp*, 118 F.3d 460 (6th Cir.), *cert. denied*, 521 U.S. 1130 (1997) ..... 4, 11

*Nelson v. Campbell*, 2003 WL 22309895 (11th Cir. Oct. 8, 2003) ..... 7, 10

*Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997) ..... 4

*Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1988) ..... 2, 4, 5

*Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) ..... 2, 3, 4


### STATUTES


28 U.S.C. § 2244 ..... 8

42 U.S.C. § 1983 ..... passim

Ala. Code § 15-18-82.1 (1975) ..... 14

Ala. Code § 15-18-82.1(b) (1975) ..... 15


### OTHER AUTHORITIES


Deborah W. Denno, When Legislature Delegate Death: The Troubling Paradox Behind State Uses Of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio State L. J. 63 (2002) ..... 9

Florida Senate Committee on Criminal Justice, A Monitor: Methods of Execution & Protocols (1997) ..... 9, 10

Principles and Practice of Emergency Medicine, Volume One 687 (George R. Schwartz, M.D. ed. 3rd ed. 1992) .....11

The Merck Manual of Diagnosis and Therapy 1621 (Mark H. Beers, M.D. & Robert Berkow, M.D. eds., 17th ed. 1999).....10



## INTRODUCTION

The State of Alabama submits this supplemental brief under Rule 15.8 of the rules of this Court in support of its opposition to Nelson's petition for a writ of certiorari. Nelson's petition was filed in this Court on the day of his scheduled execution, October 9, 2003. The State received a copy of Nelson's petition, along with two motions for stay and a petition for an original writ of habeas corpus, at approximately 1:45 p.m. In addition, that same afternoon, Nelson filed, in the Supreme Court of Alabama, a motion seeking a stay on the basis that his execution would violate the Constitution of Alabama. The State was, therefore, required to respond to Nelson's "eleventh hour" maneuvering in both this Court and the Supreme Court of Alabama. A response was submitted in the Supreme Court of Alabama between 2:00 and 3:00 p.m. A response to each of Nelson's pleadings filed in this Court, including a brief in opposition to Nelson's petition for a writ of certiorari, was faxed shortly after 3:00 p.m. Because of the timing of Nelson's petition – and the knowledge that this Court was awaiting a response – the State was required to hastily respond to Nelson's petition for a writ of certiorari. The State respectfully submits this supplemental brief in an effort to provide the Court with a more thorough response.

## I. There is No Split in the Circuits Regarding Whether a Claim Such as Nelson's Can be Brought Under Section 1983.

Nelson asserts that "this Court should resolve the split among the circuits and address the important question ... concerning the viability of a § 1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence." (Nelson's reply brief at p. 9) Nelson has failed to present an issue worthy of certiorari review. First, an examination of the cases Nelson relies on to support his assertion of a split reveals that no such split exists. Second, Nelson's contention that he is not challenging his sentence is incorrect. Because Nelson is challenging the procedures which may be necessary to carry out his sentence of death by lethal injection, he is, in fact, challenging his sentence.

### A. There is no split of authority on the issue whether a claim such as Nelson's can be brought under section 1983.

Nelson asserts that the decision of the Court of Appeals is in conflict with the Eighth Circuit, the Ninth Circuit, and the Tenth Circuit. (Nelson's reply brief at p. 12)[1] More specifically, he relies on *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000), *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1988), and *Duvall v. Keating*, 162 F.3d 1058

[1] In his petition for a writ of certiorari, Nelson asserted that there was also a split between the Eleventh Circuit and the Sixth Circuit. In his reply brief, however, he states that his reliance on the Sixth Circuit to support his contention of a split was a "mistake."



(10th Cir. 1998). None of these decisions, however, conflict with the opinion of the Eleventh Circuit Court of Appeals in this case.

In *Young*, the death row inmate filed an action under section 1983 asserting that "the defendant Hayes, Circuit Attorney for the City of St. Louis, ha[d] threatened to fire one of the lawyers under her supervision, ... if [that lawyer] provide[d] information to the Governor ... in connection with a clemency petition Mr. Young wishe[d] to file." 218 F.3d at 851. The complaint was not, therefore, an Eighth Amendment challenge to the execution or any of the execution procedures, but rather asserted a due process violation based on "[i]nterference by an official of the State with the clemency process." *Id.* The district court did not address the jurisdictional issue and "dismissed the complaint for failure to state a claim, holding that there is no right whatever to due process of law in connection with a clemency proceeding." *Id.* at 852. On appeal, the Court of Appeals for the Eighth Circuit reversed on the merits, but, like the district court, did not address the jurisdictional issue. Whether the complaint should have been treated as an habeas was not considered by the Court of Appeals. "Because jurisdiction was not addressed, the [*Young*] decision is not binding precedent on the jurisdictional question presented in this case." *Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932, 934 n. * (11th Cir. 2001), *citing FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). *Young* does not, therefore, conflict with the decision below.

Indeed, when the Eighth Circuit has considered a claim like Nelson's, it has resolved it in a manner consistent with the opinion at issue here. In *Williams v. Hopkins*, 130 F.3d 333, 334 (8th Cir. 1997), the court considered a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." Regarding the latter claim, Williams could have, like Nelson, couched his claim as not a challenge to electrocution in general, but rather a challenge to the particular method by which Nebraska administers the electrical current. The 1983 complaint was rejected, however, on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336. "[A] 'challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus.'" *Id.* at 336, *quoting In re Sapp*, 118 F.3d 460, 462 (6th Cir.), *cert. denied*, 521 U.S. 1130 (1997). There is, therefore, no conflict between the Eleventh Circuit and the Eighth Circuit on the question presented.

Similarly, Nelson's reliance on *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1988), to support the existence of a split is flawed. *Wilson*, like *Young*, involved a due process



challenge to California's clemency proceedings, not a challenge to the execution procedures. *Wilson*, 161 F.3d at 1186. Moreover, the Ninth Circuit Court of Appeals did not even address the issue which Nelson claims has split the circuits. Rather, in *Wilson*, the district court granted a Temporary Restraining Order staying Jaturun Siripongs' execution based on his claim that "the clemency proceeding he received violated federal principles of due process ...." *Id.* In response, the State filed a petition for writ of mandamus seeking to overrule the Temporary Restraining Order. *Id.* The Court of Appeals denied the petition for mandamus not because, as Nelson insinuates, the action was properly filed under section 1983, but rather because the Court determined that the State did not demonstrate an entitlement to mandamus relief. *Id.* at 1187-88. The case cannot, therefore, be considered to be in conflict with the opinion below.[2]

Finally, not unlike the first two cases, the third case relied on by Nelson, *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998), does not address the jurisdictional issue. In *Duvall*, a death row prisoner appealed "the order of the district court denying his request for a temporary restraining order ('TRO') and preliminary injunction and granting judgment in favor of defendants on his claim

[2] In his petition for a writ of certiorari, Nelson originally relied on *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996) to support his claim that the Ninth Circuit conflicted with the Eleventh circuit. As was pointed out by the State in its brief in opposition, however, the judgment in *Gomez* was subsequently vacated by this Court. 519 U.S. 918 (1996).

brought pursuant to 42 U.S.C. § 1983." 162 F.3d at 1059. The specific claim, moreover, did not relate to any execution procedures, but again asserted a due process violation resulting from the Governor's comments "that he [would] not grant clemency for murders." *Id.* at 1060. The Court of Appeals "determined that Mr. Duvall's right to due process ha[d] not been violated" and, therefore, denied his claim on the merits without considering whether his section 1983 complaint should have been construed as a habeas petition. *Id.* at 1062. Again, "[b]ecause jurisdiction was not addressed, the [*Duvall*] decision is not binding precedent on the jurisdictional question presented in this case." *Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932, 934 n. * (11th Cir. 2001), *citing FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994).

Nelson has failed to support his claim that there is a split among the federal circuits on the jurisdictional issue presented in his case. Indeed, the only cases he relies on do not even address the issue. As pointed out in the brief in opposition, those circuits that have considered the issue in relation to a claim like Nelson's have resolved it in a manner consistent with the Eleventh Circuit. (Brief in Opposition at pp. 16-19)



**B. Because Nelson's complaint challenges procedures which may be necessary to carry out his sentence, his claim is a challenge to the sentence itself.**

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that an inmate cannot bring a § 1983 action that would "necessarily imply the invalidity of his conviction or sentence" unless he proves that his "conviction or sentence has already been invalidated." *Id.* at 486-87. Here, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." *Nelson v. Campbell*, 2003 WL 22309895 at * 2, n. 4 (11th Cir. Oct. 8, 2003). His complaint was, therefore, properly construed as the "functional equivalent" of a successive habeas petition.

To avoid this result, Nelson has, throughout these proceedings, continuously stated that he does not challenge the validity of his sentence, but merely the possibility that the State will utilize a "cut-down" procedure to gain venous access for the purpose of carrying out the sentence.[3] This is a distinction without a difference. To carry out Nelson's execution by lethal injection, it is necessary to

[3] Contrary to the repeated representations of Nelson during this "last minute" litigation, the use of the procedure at issue is merely a possibility and will only be utilized as a last resort. Despite being aware of this fact, Nelson prominently placed on the front of his pleadings in the Alabama Supreme Court and the Eleventh Circuit Court of Appeals, the following statement: "Cut-down procedure expected to begin at approximately 4:00 p.m. central time." This representation was false.

gain venous access. A challenge to the procedures necessary to gain venous access is, therefore, a challenge to the method of execution itself.

Nelson's claim is no different than if he were challenging the use of a particular chemical during the lethal injection process. In such a case, he could characterize his claim, just as he as done here, as not a challenge to his execution per se, or even to lethal injection per se, but to the use of a particular chemical in the execution procedure. There can also be little doubt that Nelson could obtain an expert who would testify that a different chemical, a different amount, or a different method of administering the chemical would be more humane, effective, etc. The challenge would still be a challenge to the method of execution. Allowing Nelson to avoid the congressionally mandated restrictions of 28 U.S.C. section 2244 would open the section 1983 door to any claim professing to challenge not the method of execution itself, but rather a particular procedure utilized during the execution process. Again, this is a distinction without a practical difference.

Consistent with a number of other states utilizing lethal injection, the cut-down procedure will only be utilized in Nelson's case if the medical personnel responsible for connecting the direct intravenous line are unable to otherwise locate a suitable peripheral vein. At least three other States include the possibility of a cut-down procedure within their protocol for administering lethal injection.



Georgia's protocol specifically states that "[i]f the [condemned's] veins are such that an IV cannot be started, a contract physician will perform the cut down procedure to establish and intravenous port." Deborah W. Denno, When Legislature Delegate Death: The Troubling Paradox Behind State Uses Of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio State L. J. 63, 218 (2002). The protocol for the State of New Jersey provides that "[i]n the event that a useful vein cannot be located in any of the above site locations, the Medical Director shall execute a cut-down procedure to insert the intravenous line." Id. at 231. Similarly in Tennessee, "[t]he physician will be available in the designated waiting area and will perform a cutdown procedure if the IV technicians are unable to find a vein that is adequate enough to insert a catheter." Id. at 254. Additionally, in a report on methods of execution and protocols, the Florida Senate Committee on Criminal Justice noted that it had received information from a number of other States regarding lethal injection procedures. Florida Senate Committee on Criminal Justice, A Monitor: Methods of Execution & Protocols (1997), n. 24 available at http://www.fcc.state.fl.us/fcc/reports/monitor/methmon.html. "All of the states [Arizona, Idaho, Illinois, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia] report[ed] that a 'cut down'

procedure (a surgical procedure) is available if there is difficulty in locating a vein." Id.

Contrary to the representations of Dr. Heath, a "cut-down" is a medically recognized procedure that is commonly "used when percutaneous catheter insertion is not feasible ...." The Merck Manual of Diagnosis and Therapy 1621 (Mark H. Beers, M.D. & Robert Berkow, M.D. eds., 17th ed. 1999). The procedure "requires a small skin incision, after which a venotomy is made and a wide-bore plastic catheter is inserted into the vein and secured with sutures." Id. Although there are some "[c]ommon complications (e.g., local infection, venous thrombosis, thromhophlebitis, interstitial fluid extravasation)[, they] can be reduced by catheter removal as soon as possible or frequent catheter replacement." Id. Obviously, complications that can be reduced by catheter removal or replacement will not arise under the circumstances at issue here.

Dr. Heath, who has served as an expert for the condemned in at least two other death penalty cases,[4] describes the procedure in a much more dramatic

[4] Dr. Heath submitted an affidavit on behalf of Wallace M. Fugate, III in the case the Eleventh Circuit Court of Appeals found "indistinguishable" from this one. See *Nelson v. Campbell*, 2003 WL 22309895, at * 1 (11th Cir. 2003) ("We believe that the instant case is indistinguishable from *Fugate*; both sought to minimize the risk of unnecessary pain during the execution process, and both sought to stay the execution until appropriate corrective measures were taken."). He also testified on behalf of a death row inmate in Tennessee who was facing execution by lethal injection. See New York Times, Lethal Injection Drug May Be Deceptive, October 7, 2003. (referring to Dr. Mark Heath's testimony supporting death row inmate's claim that lethal injection, Tennessee's method of execution, violates the Eighth Amendment).



fashion plainly slanted to suit the purpose of his testimony. For example, he states that "[w]hen performed electively, ... cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience." (Affidavit of Dr. Heath at paragraph 13) This statement is, however, nonsensical. If the procedure is necessary to locate a vein for connecting an intravenous line, how is one able to "adminst[er] potent intravenous analgesics?" It simply is not uncommon for the procedure to be conducted using a local anesthetic. See Principles and Practice of Emergency Medicine, Volume One 687 (George R. Schwartz, M.D. ed. 3rd ed. 1992) ("The region of the incision is infiltrated with local anesthetic (this may be omitted in the unconscious patient or the neonate.").

The fact that at least fourteen other States consider a cut-down to be a viable method for obtaining venous access demonstrates that the procedure is part of the lethal injection process. Nelson's attempt to have the mere possibility of such a process declared unconstitutional is a challenge to Alabama's manner of execution and, thus, a challenge to the sentence itself. *See In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997) (holding that a "challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus"), *cert. denied*, 521 U.S. 1130 (1997). A contrary

holding would invite section 1983 actions in all of the States utilizing lethal injections challenging cut-down procedures or other methods for obtaining venous access, without which the sentence cannot be carried out.

## II. Nelson's Decision to File at the Eleventh Hour is not "Properly Attributable" to the Respondents.

As pointed out in the brief in opposition, Nelson was fully aware of the factual basis for his claim – including the possibility that, if necessary, a "cut-down" procedure would be utilized – nearly two months before his scheduled execution date. Yet, despite this fact, Nelson waited until the afternoon of the Monday before his scheduled Thursday execution to file his complaint. In his reply brief, he attempts to blame the State for his decision to wait until the "eleventh hour" to pursue his claim. Specifically, he asserts that "[t]he delay is properly attributable to the Respondents because the Respondents misled the Petitioner concerning the time at which the medical procedure would be performed and only informed the Petitioner of the true time that the medical procedure would be performed six days prior to the date of the Petitioner's scheduled execution." (Nelson's reply brief at p. 1) Nelson's excuse is fallacious and unsupported by the facts.

Nelson has never sought relief on the basis of the timing of the procedure in question. Rather, he has always based his claim of an Eighth Amendment violation on the procedure itself. (See Nelson's Petition for a Writ of Certiorari at



p. 4) ("Nelson brought this action pursuant to 42 U.S.C. § 1983 to challenge the cut-down procedure which the Respondents intend to utilize in order to gain venous access prior to Nelson's execution.") It is undisputed that nearly two months before his scheduled execution date, Nelson was aware of the possibility that a "cut-down" procedure would be required, and whether such a procedure constitutes cruel and unusual punishment clearly does not turn on when it is utilized.

Nelson's after-the-fact excuse is further contradicted by his contention that he has "consistently since mid-August 2003 attempted to have [Nelson] examined by a physician,[5] to acquire the State of Alabama's written protocol for the legal procedure of execution by lethal injection and/or for the medical procedure that will be necessary to be performed as a predicate to the execution, and to ensure that a credentialed physician with adequate training and experience would perform the medical procedure on [Nelson] with access to proper medical equipment." (Nelson's petition at pp. 6-7, n. 2) He further asserts that the "Respondent has continuously ... frustrated [his] efforts in these endeavors." (Id.) These statements cannot be reconciled with Nelson's after-the-fact position that he waited until the "eleventh hour" to file his claim because he "believed that the Respondents were

[5] Warden Culliver refuted this claim in his affidavit, stating that "[n]either Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson." (Culliver affidavit at ¶ 5)

acting in good faith" until the Friday before his scheduled execution. Either the Respondents were "continuously frustrating his efforts" or they were "acting in good faith." Both statements cannot be accurate. Plainly, Nelson waited to file his complaint until the "eleventh hour" in an effort to prevent the State from carrying out his sentence. Indeed, the tactic succeeded. This Court granted a stay because it needed *more time* to consider Nelson's petition for a writ of certiorari.[6]

Finally, it is undisputed that a concern about the status of Nelson's peripheral veins came to the attention of the State because Nelson raised the concern. Nelson was fully aware that, because of his prior intravenous drug use, locating a peripheral vein in his lower arms might be problematic. He even references previous occasions when, he claims, medical personal had a difficult time locating a vein for the purpose of drawing blood. (See Nelson's petition at p. 5) He was, therefore, aware of the basis for his claim on July 1, 2002 when the State of Alabama changed its primary method of execution from electrocution to lethal injection. Ala. Code § 15-18-82.1. Indeed, within 30 days of that date,

[6] Nelson's decision to wait until the week of his execution to file his claim also benefited him by requiring the State to hastily prepare a response. For example, he has repeatedly pointed out that the affidavits submitted by the State mislabel the vein in Nelson's neck that may be utilized depending on whether other primary options are successful. Admittedly, the vein was mislabeled and that was a mistake. As Dr. Heath subsequently correctly speculated, the affidavits should have referred to "the 'external jugular vein.'" (Second affidavit of Dr. Mark Heath at ¶ 8) Dr. Heath characterizes the external jugular vein as a "commonly-used structure for obtaining intravenous access if peripheral access can not be secured" and provides no basis for a belief that, should it become necessary, the jugular vein cannot be successfully utilized for such a purpose in this case.



under section § 15-18-82.1(b), Nelson could have elected to have his sentence carried out by electrocution. Instead, Nelson waited until the week of his execution to file his complaint, successfully preventing the State of Alabama from carrying out his lawfully imposed sentence.

## CONCLUSION

Based upon the preceding legal authority and argument, this Court should deny Nelson's petition for a writ of certiorari.

Respectfully submitted,

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November 6, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served three copies of the foregoing brief on the attorneys for the petitioner by placing the same in the United States mail, postage prepaid and properly addressed as follows:

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